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No. 430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY,
JOHN D. BAGWELL FARMS AND HATCHERY, INC.,
a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners

v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY,
a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents

BRIEF FOR RESPONDENT SOUTHERN RAILWAY COMPANY IN OPPOSITION TO PETITION AND SUPPLEMENTAL PETITION

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September 26, 1962

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (unreported) is printed as Appendix B to Petitioners' Supplemental Petition. All other relevant opinions are printed as Appendices to the original Petition.

QUESTION PRESENTED

Whether the Interstate Commerce Act means what it says in providing that a rate filed by a carrier and thereafter suspended by the Commission "shall go into effect" at the end of the statutory suspension period, even if the Commission has not concluded its hearings; or whether, on the other hand, a United States district judge has jurisdiction and authority to do what the Commission is not permitted to do, namely, restrain the carrier from putting the rate into effect after the end of the statutory suspension even though, if the rate goes into effect and is subsequently held illegal, persons injured thereby have a statutory remedy for damages, whereas if the rate is not permitted to go into effect and is subsequently found legal, shippers and consumers as well as the carrier, who would have benefited from the rate, have no remedy whatsoever for injuries suffered by reason of the suspension.

STATUTE INVOLVED

Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such

hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges, as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 8 of the same Act, 49 U.S.C. § 8, reads:

> "In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of *damages sustained* in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

STATEMENT

Proceedings Below

The petition seeks review of a judgment of the Court of Appeals for the Fifth Circuit affirming a judgment of the United States District Court for the Northern District of Alabama, which on August 2, 1962, denied petitioners' motion for a preliminary injunction. The injunction asked for was one forbidding respondent Southern Railway Company (hereafter Southern) to put into effect certain reduced grain rates which it had filed with the Interstate Commerce Commission. The rates were then and are now under investigation by the Interstate Commerce Commission, which had in accordance with Section 15(7) of the Interstate Commerce Act suspended their effectiveness until August 7, 1962, at which time the statutory suspension period expired by law. (Pet. App. B).

On August 3, 1962, the day after the District Court's decision, Judge Gewin of the Court of Appeals for the Fifth Circuit granted a temporary restraining

order of one day's duration (from August 7 to August 8) to give a full panel of that Court an opportunity to hear petitioners' application for a restraining order pending appeal to it of the District Court's decision. That application was duly heard on August 8, and on the same day the Court of Appeals, finding that "there is no reasonable prospect that the appellants will ultimately be successful upon this appeal," denied it. (*Pet. App. D*). *Thereafter Mr. Justice* Black extended the restraint theretofore placed on Southern pending filing by petitioners of a petition for certiorari and its disposition by this Court.

In consequence of the events described, by the earliest date that this Court can pass upon the petition Southern will have been already continuously restrained from putting its rates into effect for more than eight weeks beyond the time at which both courts below have declared that by law such restraint must end.

The rates here involved, more specifically described below, were filed by Southern with the Commission in July 1961. Protests were filed by barge lines currently moving grain to the Tennessee River ports; large grain receivers by water located at the Tennessee River, such as Cargill, Incorporated, Central Soya Company and Dixie-Portland Flour Mills; Tennessee Valley Authority; flour milling interests outside the Southeast; certain boards of trade such as those of Chicago, Kansas City and Toledo; and others who expected to feel the competitive impact of these reduced rates.[1] Southern's rates were supported by numerous receivers of

[1] It may be noted that only a very few of these protestants are petitioners here.

grain in the Southeast, by the United States Department of Agriculture, the Southern Governors' Conference, the Southeastern Association of Railroad and Utility Commissioners, state regulatory commissions throughout the South and in many of the Western grain-growing states, several organizations representing poultry and livestock producers in the Southeastern states, etc.

The Commission suspended the rates for the statutory period of seven months and instituted an investigation proceeding as required by the statute. Southern agreed to extensions of the suspension period for four additional months to compensate for delays in the hearing. With such extensions the statutory period ended on August 7, 1962. Southern made it clear from the beginning that it was not prepared to agree to additional voluntary suspension, since it had made a very heavy capital investment to make possible the new rate structure and since shippers and consumers throughout the Southeast, as well as the Governments of the Southeastern states, were counting heavily on the benefits that the new rates will occasion.

The evidentiary hearing before an examiner began on January 8, 1962. Southern's case-in-chief was completed February 8, 1962; that of protestants on June 11, 1962; Southern's rebuttal case, largely prepared in writing and submitted to protestants in advance, on August 29, 1962, on which date the hearing closed. A large proportion of the time devoted to Southern's case-in-chief and rebuttal was taken up with cross-examination by the protestants of witnesses for Southern and supporting intervenors.

Petitioners on July 27, 1962, filed their complaint to enjoin the rates following the expiration of the statu-

tory suspension period, and on August 1 moved for a preliminary injunction. Southern answered and moved to dismiss on the same day, and the proceedings have thereafter taken the course outlined at the beginning of this Statement.

The History of the Rates in Question

Petitioners have sought to cast about this case a sinister aura of predatory and monopolistic intent.[2] *A brief description* of the history of the rates involved, as disclosed by evidence adduced in the proceeding before the I.C.C. and affidavits filed in the District Court, will serve to put their contentions in proper perspective.

The management of Southern does not share the defeatest belief, often expressed, that railroads, once a vigorous if not revolutionary factor in national development, have, so to speak, passed from middle age into decline and have no further imaginative contribution to make to the future development of the communities they serve. Southern's management has been at work for some years upon a far-reaching transportation innovation, which, through making possible a great reduction in rates applicable to a commodity of vital and widespread importance to the whole Southeastern United States, would stimulate and multiply economic activity throughout that whole area. The enthusiastic support which the results of these efforts have inspired, not only among farmers, consumers and business enterprises, but throughout the State Governments in the Southeast and elsewhere and in the

[2] On the other hand, petitioners did not seriously press in the courts below, and before this Court have not even adverted to, the allegations of conspiracy that appear in their complaint.

United States Department of Agriculture, attests to their success.

At the present time the large amount of grain which moves into the Southeast, a deficit area in this commodity, is carried roughly 60% by back-haul "gypsy" truckers and merchant truckers whose rates are exempt from regulation by the Interstate Commerce Commission, 20% by barges also free for the most part from rate regulation by virtue of the bulk commodity exemption and 20% by railroads whose rates are entirely regulated. The higher transportation cost of the 20% of the grain moved by railroads, with resulting higher rates, has in the past provided an umbrella over charges laid upon the other 80% of the movement.

The endeavor of Southern to produce more realistic rail rates brought together experts and ideas from many sources to contribute a series of radical innovations—a technological innovation in construction of cars to move grain in bulk so that much more cargo might be moved per ton of car weight; an innovation in railway management to encourage multiple car movements and thus decrease the cost of paper work, switching, etc.; an innovation in rate structure which cut out "frills" included in rates (e.g., in-transit privileges), thus producing what might be called a tourist rate for bulk movements of grain. The rate innovation made possible by these steps is one of application to grain movements from the river crossings on Southern's system at Cincinnati, Louisville, Evansville, St. Louis, and Memphis to points on its system in the Southeast. Southern has offered on the record before the Commission to extend these rates to any point on its system where they are desired, whether such point is on a river or inland.

The rates apply only to movements of grain in so-called "Big John" freight cars with aluminum bodies, especially designed and built for this use. To secure application of the most advanced light metals construction techniques Southern had to go outside the railroad equipment industry to Lockheed Aircraft Corporation, with whose co-operation the Big John was ultimately successfully developed. In order to secure the development and manufacture of the cars on an economically feasible basis, it was necessary to acquire them in substantial numbers. Accordingly, Southern purchased a total of 575 of which more than 500 have already been delivered and the balance will be delivered by October 1. Each car has a cargo capacity approximately twice that of a conventional freight car but has an empty weight only slightly greater.

The rates apply only to movement in five, ten and twenty car lots, which permits substantial savings in switching service at plants and in classification and transfer, where the cost of work on multiple car lots is little greater than on a single car. They apply only on bare transportation with no in-transit privileges and with strict demurrage rules designed to keep to an absolute minimum the time that cars are out of transportation service, a service comparble to that furnished by barge and truck and which meets the same demand.

The dramatic operating and other economies resulting from the combination of factors listed makes possible the rates now under consideration by the Commission. The Southeastern portion of the United States is a rapidly developing area with increasing diversity of economic activity. There grain consumption is already large, requiring large imports from other areas.

With more economic transportation costs, and consequently lower prices, new and expanded demands for grain can be created, for processing directly for human consumption and as animal and poultry feeds.

REASONS FOR DENYING THE WRIT

The decision below presents no important question of federal law appropriate for review by this Court, results in no conflict of decision warranting such review, and is plainly correct. Moreover, in the circumstances of this case the very granting of the writ would, in practical effect, be virtually tantamount to a determination on the merits in favor of petitioners and would result in irreparable injury not merely to Southern, but likewise to a large number of shippers and consumers in the Southeastern United States.

The suspension provisions of Part I of the Interstate Commerce Act, embodied in Section 15(7) (49 U.S.C. § 15(7)), have with minor changes been continuously in effect since 1910, except for a brief period during and immediately after World War I. Similar provisions, giving the I.C.C. or another regulatory agency the authority to suspend for a limited period rates filed by those subject to the agency's jurisdiction, and providing that at the end of the suspension period the rates are to go into effect, have been contained for many years in the Motor Carrier Act (49 U.S.C. §§ 316(g), 318(c) (since 1935)), the Water Carrier Act (49 U.S.C. § 907(g), (i) (since 1941)), the Freight Forwarders Act (49 U.S.C. § 1006(e) (since 1942)), the Federal Communications Act (47 U.S.C. § 204 (since 1934)), the Federal Power Act (16 U.S.C. § 824d(e) (since 1935)), the Natural Gas Act (15 U.S.C. § 717c (e) (since 1938)), and the Federal Aviation Act (49 U.S.C. § 1482(g) (since 1938)).

During all these periods of years, and under all these statutes, there has prior to this case not once arisen the question which petitioners would have this Court believe is of pressing and general importance. Not once has a competitor, or a user of the regulated service or commodity, urged any court that rates or charges which have been suspended by the agency, but as to which the suspension period has expired prior to completion of the agency investigatory proceeding, should be set aside pending the completion of that proceeding.

This fact necessarily leads to one or both of two conclusions: (1) that no one has ever heretofore felt the need for a remedy of the kind here sought, or (2) that it has always been regarded as too plain for argument that this particular form of relief is not available. Whether taken separately or together, these are compelling grounds for a determination that no grant of the writ is here warranted.

If the first conclusion is correct, it is apparent that except in factual circumstances so unusual that there is no reason to anticipate their recurrence, the availability of relief of the kind here sought is of only academic significance—that this case presents no question of genuine importance but rather one whose resolution would have a practical impact only on the interests of the immediate parties. And if the true explanation is simply that the answer to the question here presented has always been regarded as clear, that is itself the strongest possible demonstration of the fact that this case raises no novel issue, but rather one settled long ago by a statutory provision that is, as the Court of Appeals noted in its decision on the merits, "a model of clarity."

To demonstrate that the decision below correctly applies settled principles, it seems hardly necessary to go beyond the words of the statute itself. Unless Congress meant something very different indeed from what it said, its plainly expressed intent was, in the words of the statute, that after a rate is suspended and a proceeding instituted:

> "If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice *shall go into effect at the end of such period* * * *." [Emphasis added.]

That Congress in fact meant precisely what it said, and that under the scheme of the statute it is only the Commission which has the authority to suspend rates, and that only for the period specified in the statute, was unequivocally confirmed by Chief Justice Hughes, speaking for a unanimous Court, in *Board of Railroad Commissioners of North Dakota v. Great Northern Railway Co.*, 281 U.S. 412, 429:

> "When, before the amendments of 1910 of the Interstate Commerce Act, the question arose as to the propriety of judicial action in granting injunctions against the maintenance of interstate rates, filed and published by carriers as provided by law, pending the decision of the Interstate Commerce Commission whether such rates were unreasonable or unjustly discriminatory, there was a conflict of opinion in the lower Federal courts, but the weight of decision was that such relief, although temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission, and this ruling accorded with the principle declared by this Court in the *Abilene* and other cases, *supra*. Congress, in 1910, authorized the Interstate Commerce

> Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation. [citations omitted] *This power of suspension was entrusted to the Commission only.*" [Emphasis added.]

The scheme of the statute is clear. When Congress decreed that the Interstate Commerce Commission might suspend rates for a stated period while an investigation of their legality was commenced, it quite understandably gave the suspensory power to the Commission alone; for, as the Court of Appeals pointed out, the power to suspend rates is, in effect, one to determine them for the period of suspension and is a legislative function. Furthermore, Congress by this enactment "cut significantly into pre-existing rights of the carrier to set his own rates and put them into immediate effect * * *." See *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 479. In providing that any suspension should be for a maximum fixed period—since 1927 seven months—and in rejecting the alternative of permitting the suspension period to run until the time of decision by the Commission, Congress made a balanced and deliberate compromise between conflicting interests.[3] It placed upon the carrier instituting the

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[3] The meticulous care with which Congress made this compromise is demonstrated by the fact that before it settled on the present seven-month suspension period, it experimented with both longer (see 36 Stat. 552) and shorter (see 41 Stat. 486) periods. It specifically rejected the suggestion that new rates should be suspended until the Commission had passed on their lawfulness, placing the rejection on the ground that such a provision would be unfair to carriers and that a compromise solution was more equitable. See 45 Cong. Rec. 4109-4110, 4711-4713, 5443, 5846-5849, 6509, 6782, 6787, 6915. See also H.R. Rep. No. 456, 66th Cong., 1st Sess.; 58 Cong. Rec. 8317.

rate the burden of having the rate suspended by the Commission without any provision for compensation by a suit for damages should the rate subsequently be declared legal. But for this very reason, it limited the period over which the carrier might be required to bear this burden to a time certain—seven months. At the same time, it provided for persons, like petitioners, claiming injury from an allegedly unlawful rate not only the protection of the Commission's right to suspend that rate for a seven-month period (by the expiration of which an investigation of its legality would, if not completed, be well under way) but also a specific statutory remedy in damages. (49 U.S.C. § 8). This balancing of equities, so carefully made by the lawmaker, petitioners would now upset. They would bear none of the burdens inherent in determining a new rate, but would place them all upon Southern and upon the many shippers and consumers which Southern serves. And this though the burden which petitioners seek to shift would as to them be merely having to be content with their remedy at law if the rate proves to be illegal whereas to Southern, shippers and consumers that burden would be complete foreclosure from the benefit of the new rates for a substantial additional period even if those rates are lawful. The courts below were clearly correct in refusing to disregard the studied compromise that Congress has made in Section 15(7) by decreeing that the carrier must bear the whole of a burden that Congress has determined it should bear only in part.

Petitioners' extravagant assertions that the decision of the courts below leaves common carriers "free to engage at will in unlawful, monopolistic competitive practices, contrary to the public interest and to

declared national policy" (*e.g.*, Pet. p. 9) is pure bombast. The Commission is authorized to declare an obviously predatory rate unlawful on its face, long before the suspension period could have elapsed, and Section 8 of the Act (49 U.S.C. § 8) which the Court of Appeals expressly noted gives a statutory right of action for damages to persons injured by an unlawful rate, stands squarely in the way of the drastic consequences that petitioners purport to envisage. Petitioners' plaintive assertions as to the "inadequacy" of the latter remedy must be evaluated in light of the fact that Southern, and the many shippers and consumers to whom the new rates will be a great boon, would have *no* remedy should an injunction issue and the rates subsequently be declared to be lawful.

Petitioners' argument that the decision below raises constitutional questions is frivolous. It is well settled that business enterprises have no constitutional right to be protected from competition, *Tennessee Power Co.* v. *T.V.A.*, 306 U.S. 118. Thus Congress, in giving persons like petitioners the right to challenge the rates of their competitors, was plainly free to place any limitations it saw fit on the manner in which that right might be exercised.

The suggestion that the decision below conflicts with *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472 (D. Ore. 1955), and *Cantlay & Tanzola, Inc.* v. *United States*, 115 F. Supp. 72 (S.D. Cal. 1953), will not survive analysis. As petitioners' papers themselves disclose, each of those proceedings involved review by a statutory three-judge court of an order of the Interstate Commerce Commission. Here, in contrast, petitioners sought an injunction from a single

judge, and are not asking for review of any order of the Commission since no such order as yet exists.[4]

It should be emphasized that although judgment has gone against petitioners in both courts below, with the Court of Appeals in effect ruling that petitioners' position was frivolous by denying them interlocutory relief pending its decision, petitioners have nevertheless already won a large measure of the relief that they sought in this case. By the time this Court can pass on their petition for certiorari, the rates in question will already have been suspended for more than two months beyond the expiration of the statutory suspension period, to the great detriment of shippers and consumers in the Southeastern United States, as well as to Southern. Were this Court to grant certiorari and continue, pending oral argument and decision, the injunction forbidding Southern to give shippers and consumers the benefit of the reduced rates, the consequences to Southern, to shippers and consumers, and to the economies of the states which Southern serves, would be even more severe. For were this to happen, petitioners would have achieved substantially the *entire* measure of relief sought by their complaint, and this irrespective of whether this Court ultimately were to rule for or against petitioners or indeed whether,

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[4] The court in Cantlay & Tanzola expressly noted that:

"The Congressional intent plainly is that the courts not interfere to suspend carrier-made rates 'prior to an appropriate finding by the Interstate Commerce Commission.' Board of Railroad Com'rs. v. Great Northern Ry. * * *." 115 F. Supp. at 83.

as would be not at all unlikely, the case were to become moot pending decision on the merits.[5]

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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[5] As to cases involving a different but comparable issue which have become moot pending decision by this Court, see Luckenbach Steamship Co. v. United States, 179 F. Supp. 605 (D. Del. 1959), in part vacated and ordered dismissed as moot, 364 U.S. 280; Dixie Carriers v. United States, 143 F. Supp. 844 (S.D. Tex. 1956), vacated and ordered dismissed as moot, 355 U.S. 179; Amarillo-Borger Express v. United States, 138 F. Supp. 411 (N.D. Tex. 1956), vacated and ordered dismissed as moot, 352 U.S. 1028.